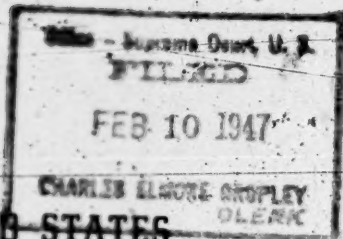


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1003 39

AERO MAYFLOWER TRANSIT COMPANY,
Appellant,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

STATEMENT AS TO JURISDICTION

EDMOND G. TOOMEY,
EMMETT S. HUGGINS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 8646

AERO MAYFLOWER TRANSIT COMPANY,

A CORPORATION,

Defendant and Appellant,

vs.

**BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA, PAUL T. SMITH, LEONARD
C. YOUNG AND HORACE F. CASEY, AS MEMBERS OF
AND CONSTITUTING SAID BOARD OF RAILROAD COMMISSIONERS
OF THE STATE OF MONTANA,**

Plaintiffs and Appellees

STATEMENT AS TO JURISDICTION UNDER RULE 12

The defendant-appellant, Aero Mayflower Transit Company, a corporation, this day concurrently presenting its petition for appeal, pursuant to Rule 12 of the Rules of the Supreme Court of the United States, now presents this, its statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on this appeal to review the final judgment and decree

of the Supreme Court of Montana, dated September 19, 1946, and should exercise such jurisdiction in this case.

A

The Statutory Provision Believed to Sustain the Jurisdiction

This appeal is prosecuted from a final judgment and decree of the Supreme Court of the State of Montana, which restrains and enjoins the defendant, Aero Mayflower Transit Company, from operating in interstate commerce over the public highways of the State of Montana, until it pays to the Board of Railroad Commissioners of the State of Montana, for the years 1937, 1938 and 1939, two (2) kinds of taxes imposed upon its interstate operations by virtue of two (2) different statutes enacted by the legislative assembly of the State of Montana, viz.,

(1) a "flat" or "straight" \$10.00 per annum tax on each vehicle operated over the public highways of the State of Montana, imposed by sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, originally enacted as sections 16, 17 and 18 of Chapter 184, Laws of Montana, 1931, and, also,

(2) a quarterly tax or fee of one-half of one percent of the gross operating revenue of the carrier with a minimum annual fee of \$15.00 for each vehicle registered and/or operated under the Motor Carrier Act, imposed by sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, originally enacted as sections 2 and 3 of Chapter 100, Laws of Montana, 1935, each of said taxes being laid, in the words of such statutes, "in addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state."

The appeal is on the general grounds, particularized in the Assignment of Errors filed by appellant, that these

statutes and the judgment and decree of the said Supreme Court of the State of Montana, deprive the appellant of property without due process of law, deny it the equal protection of the law, and violate the Commerce clause, in contravention of the Constitution of the United States, and that their enforcement should not be permitted.

The final judgment and decree of the Supreme Court of the State of Montana was entered in that Court at Helena, Montana, on September 19, 1946, after petition by appellant for rehearing filed therein July 8, 1946 (and answer thereto by the respondent Board of Railroad Commissioners of Montana filed therein July 15, 1946), was entertained and reviewed by the Supreme Court of Montana until September 19, 1946, when the petition for rehearing was, by order of the said Supreme Court, dated September 19, 1946, denied. Prior to such denial, Mr. Justice Cheadle, Associate Justice of the Supreme Court of Montana, filed his dissenting opinion on September 19, 1946.

Jurisdiction of this appeal is sustained by Section 237 (a) of the Judicial Code of the United States, also cited as Section 344 (a) of Title 28 of the United States Code, annotated.

B

The Statutes of the State the Validity of Which Are Involved

Two separate groups of statutory enactments are involved, the first enacted in 1931 and the second enacted in 1935. They are:

(1) *The "flat" or "straight" \$10.00 Per Vehicle Tax.*

The statutes imposing this tax were enacted as Sections 16, 17 and 18 of Chapter 184, Laws of Montana 1931, codified as Sections 3847.16, 3847.17 and 3847.18 of the Revised

Codes of Montana, 1935, found in Volume 2, Revised Codes of Montana, 1935, at pages 688 and 689, as follows:

"3847.16. (a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars (\$10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state.

"Provided, that a motor carrier engaged in seasonal operations only, where its said operations do not extend continuously over a period of not to exceed six (6) months in any calendar year, shall only be required to pay compensation and fees in a sum equal to one-half ($\frac{1}{2}$) of the compensation and fees herein provided, and, provided further, that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by a motor carrier as standby or emergency equipment. The board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as standby or emergency equipment.

"(b) When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner

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as herein required of motor carriers operating wholly within this state.

“(c) Upon the failure of any motor carrier to pay such compensation, when due, the board may in its discretion revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid.

“(d) All compensation, fees, or charges, imposed and accruing under the provisions of this Act, shall be a lien upon all property of the motor carrier used in its operations under this act; said lien shall attach at the time the compensation, fees, or charges become due and payable, and shall have the effect of an execution duly levied on such property of the motor carrier and shall so remain until said compensation, fees, or charges are paid or the property sold for the payment thereof.

“3847.17. All of the fees and compensation charges collected by the board under the provisions of this act shall be transmitted to the state treasurer who shall place the same to the credit of a special fund designated as “motor carrier fund”; such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the businesses herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the “motor carrier fund.” Such fund shall not come within the restriction of any law of this state governing payment of expense incurred in a previous year, it being intended that such fund

shall be applied to the payment of any necessary costs or expenses in carrying out the provisions of this act, whether incurred during the ensuing year or previous fiscal years, and such "motor carrier fund" or accumulations thereof, are hereby appropriated for the payment of the costs and expenses rendered necessary in the carrying out of the provisions of this act.

"3847.18. All records, books, accounts and files of every class A and class B motor carrier in this state, so far as the same shall relate to the business of transportation conducted by such motor carrier, shall at all times be subject to examination by the board or by any authorized agent or employee of the board. The board shall prescribe a uniform system of accounts and uniform reports covering the operations of such class A and class B motor carriers and every motor carrier authorized to operate as such in accordance with the provisions of this act shall keep its records, books and accounts according to such uniform system, insofar as possible. On or before the fifteenth day of July of each year, every motor carrier authorized to engage in such business shall file with the board a report, under oath. In addition to such annual reports every motor carrier shall prepare and file with the board, at the time or times and in the form to be prescribed by the board, annual reports, special reports and statements giving to the board such information as it shall require in order to perform its duties under this act."

(2) The Quarterly Gross Revenue Tax of One-Half of One Per Cent on the Gross Revenues of the Carrier.

The statutes imposing this tax were originally enacted as Sections 2 and 3 of Chapter 100, Laws of Montana, 1935, codified as Sections 3847.27 and 3847.28 of the Revised

Codes of Montana, 1935, found in Volume 2, Revised Codes of Montana, 1935, at pages 691 and 692, as follows:

“3847.27. In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00).

“3847.28. All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. All other fees and charges collected by the commission under the provisions of this act shall be by the commission paid into the state treasury and shall be by the state treasurer placed to the credit of a fund to be known as the ‘public service commission fund,’ and the general and contingent expenses of the public service commission shall be by the state treasurer paid out of said public service commission fund upon presentation of duly verified claims therefor, which claims shall have been ap-

proved by the commission and audited by the state board of examiners."

The trial court held that the "flat" or "straight" per vehicle tax was valid but that the gross revenue tax was invalid (R. 124-125; Judgment, 127-128).

The Supreme Court of Montana held that both groups of statutes and both taxes were constitutional (Appendix A, p. 22; R. 242 annexed hereto) and enjoined appellant from operating in interstate commerce until such taxes were paid (Appendix A hereto and R. 157).

G

The Date of the Judgment and Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented.

The final order, judgment or decree here sought to be reviewed was entered and spread of record in the Supreme Court of the State of Montana on September 19, 1946 (R. 157).

The petition for appeal herein was filed and was presented on December 16th, 1946 (R. 182) and allowed December 16th, 1946 (R. 266).

The Supreme Court of the State of Montana is the highest court in Montana in which a decision in the suit could be had.

Sections 1, 2 and 3, Constitution of Montana, 1 Revised Codes of Montana, 1935, pages 139, 140 and 141.

State ex rel. City of Helena v. Helena W. W. Co., 43 Mont. 169, 115 Pac. 200.

Opinion of the Supreme Court of Montana, written by Mr. Justice Morris and subscribed by three others of the

five members of the court, was rendered and filed on June 29, 1946. Mr. Justice Cheadle reserved his opinion at that time, and subsequently on September 19, 1946, filed his dissenting opinion. (Appendix A hereto, pp. 2-28; R. 221-248).

On July 8, 1946, defendant-appellant, Aero Mayflower Transit Company, filed in the Supreme Court of Montana its petition for rehearing within the time prescribed by the rules of that court (Rule XV, pp. XXX and XXXI, Volume 111, Montana Reports). (Appendix B hereto, pp. 1-17; R. 249-265.)

On July 15, 1946, the Board of Railroad Commissioners of the State of Montana filed their answer to petition for rehearing in the Supreme Court of Montana () and such petition and answer were entertained and reviewed by the Supreme Court of Montana until September 19, 1946, when it was denied (R. 157), after which remittitur was issued to the trial court and its judgment on mandate of the Supreme Court entered October 28, 1946 (R. 177).

The adjudication by the Supreme Court of Montana was final in its nature on September 19, 1946, because if there should be an affirmance by the Supreme Court of the United States the District Court of Silver Bow County, Montana, would have nothing to do but to execute the judgment it had already entered (R. 177). And see R. 295.

D

Statement Showing That the Nature of the Case and of the Rulings of the Court Was Such as to Bring the Case Within the Jurisdictional Provisions Relied upon.

It is admitted of record that Aero Mayflower Transit Company, a corporation, appellant, operates exclusively in interstate commerce, and hence no question of the power of the State of Montana to control, regulate or tax its intra-

state commerce is involved. By its answer (R. 64) to section A of defendant's (appellant's) cross-complaint (R. 10 and 11) the Board admits:

"The carrier is, and has been since September, 1928, a corporation organized and existing under and pursuant to the laws of the State of Kentucky, with its principal office in the City of Indianapolis, State of Indiana; that it owns and operates a fleet of motor trucks, inclusive of the trucks occasionally within the State of Montana as hereinafter referred to, all of which are licensed under the laws of the State of Indiana, and carry at all times license plates of the State of Indiana; that its business is that of transporting by motor vehicle, in interstate commerce only, over the highways of the United States used household goods and office furniture, incident only to the change of residence of the owner of such goods, under a separate order for such transportation and given in each instance by or on behalf of the owner of said goods, at the rate for such transportation set out in its schedule of rates on file with the Interstate Commerce Commission, of the United States. That each shipment is transported under a separate contract therefor, and may be from any point in the United States to any other point in the United States, so long as the point of destination is in a state other than the state within which the shipment originates. That the carrier does not operate its motor trucks, or any of them, on any fixed schedule, or over any regular routes. Shipments of furniture from without the state are transported to and delivered to points within the state, or shipments of furniture originating within the state are transported to points without the state, or shipments of furniture in transit are transported through the state, or motor trucks without load are driven through the state. That carrier never had done and does not now do or carry on and has no intention of

carrying on hereafter any intrastate business in the State of Montana and that its operations with respect to the State of Montana have at all times been interstate operations into, out of, across or through said State. That it has been granted, and now operates under, Permit No. 2934 issued to it by said Interstate Commerce Commission, under and pursuant to the provisions of the Federal Motor Carrier Act of 1935, as a common carrier."

The Supreme Court of Montana in its opinion stated with respect to the nature of appellant's operations:

"There is no dispute as to the facts. * * * It (the Company) does not transport goods of any nature or kind from one point to another in the same state. The only transportation it engages in so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state."

(Opinion of Supreme Court of Montana, Appendix A, Par. 3, at pp. 2 and 3; R. p. 222 and 223.)

On October 3, 1935, the Board of Railroad Commissioners of Montana (hereinafter referred to as "the Board") issued to appellant a "permit" numbered 1354, granting appellant the right to transport property as a common carrier in interstate commerce over the public highways of Montana (R. 15 and 64). On September 19, 1939, the Board issued an order to show cause why the permit should not be cancelled, alleging that the carrier (appellant) refused to pay the taxes and fees referred to (R. 16), and after answer and return by the appellant to such order, in which answer appellant attacked the constitutionality of the taxes and fees under the United States Constitution, and the State Constitution as well (R. 47-59), the Board, after a hearing, by its order of October 9, 1939, assumed to cancel the "permit" to operate in interstate commerce because

of the non-payment of the taxes and fees in question (R. 61-62). On October 13, 1939, the Board followed its administrative action by filing in the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County, at Butte, a ~~suit~~ in equity, to restrain appellant from operating in interstate commerce, until it paid the taxes and fees for which the Board made claim (R. 1-6). Appellant, as defendant in the suit, defended on the merits (R. 7-123) and after trial, the District Court of Silver Bow County by Findings of Fact and Conclusions of Law (R. 124-126) and Amended Judgment (R. 127-128).

(a) *upheld* the validity of the "flat" or "straight" per vehicle tax imposed by sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, and restrained appellant from operating in interstate commerce until such taxes were paid for the years 1937, 1938 and 1939 (R. 124-126; 127-128), but, on the other hand,

(b) *denounced* the gross revenue tax as imposed by sections 3847.27 and 3847.28, Revised Codes Montana, 1935, as invalid, and enjoined the Board from enforcing or applying such taxes against appellant (R. 124-126; 127-128).

Aero (appellant here) appealed to the Supreme Court of Montana from that part of the judgment adverse to it, i.e., upholding the validity of the "flat" or "straight" \$10.00 per vehicle tax, and the Board appealed to the Supreme Court of Montana from that part of the District Court judgment adverse to it, i.e., holding the gross revenue tax unconstitutional and void (Opinion, Appendix A. Par. 7, pp. 4 and 5; R. 224-225). Each appellant specified errors in the rulings of the lower court adverse to it (R. 128-c and 128-e.)

The Supreme Court of Montana found that the gross revenue tax was valid, and, accordingly, *reversed* the judg-

ment of the District Court of Silver Bow County as to that tax; the Supreme Court *affirmed* the trial court's conclusion that the "flat" or "straight" per vehicle tax was valid. Thus, the applicability and the constitutionality of both taxes to appellant's interstate operations was affirmed by the highest court of the State of Montana (Opinion, Appendix A and R. 157).

There was drawn in question in all stages of this suit the validity of both kinds of taxes, i.e., as imposed by both groups of statutes, on the ground that each tax as applied to appellant's exclusive interstate operations is repugnant to the Constitution of the United States. The Federal questions were repeatedly raised from the appearance of appellant in the basic administrative proceedings through appellant's petition for rehearing in the Supreme Court of Montana, as follows:

(a) In the Return To Order To Show Cause, made by appellant in Docket No. 3075, "In the Matter of Fees Claimed From Aero Mayflower Transit Company," before the Board of Railroad Commissioners of Montana, citing the cases in the Supreme Court of the United States believed to establish the invalidity of the statutes imposing both taxes, on the contention of appellant that the taxes constituted an attempt by the state to exact taxes for the privilege of carrying on interstate commerce only, without any method in the statute by which the taxes, and each of them, were related to, or measured by appellant's use of the highways of Montana, or its earnings, solely in interstate commerce, apportioned to or allocated to Montana (R. 48-59).

(b) In the Answer and Cross-complaint of appellant in the action commenced by the Board in the District Court of Silver Bow County, Montana, where the constitutionality of the "flat" or "straight" fee of \$10.00 per vehicle was challenged as contravening the equal protection clause of the Fourteenth Amendment to

the Federal Constitution (Sec. H of Cross-complaint, R. 31 and 32) and as contravening clause 3 of Section 8 of Article I of the Federal Constitution and the due process of law clause of the Fourteenth Amendment, on the grounds that the tax is an attempt by the State to lay a tax on the privilege of engaging in interstate commerce, is not apportioned on any basis whatever to that commerce, bears no relation to the use of the highways, and is indiscriminately applied to interstate and intrastate commerce (Sec. H and Sec. I of Cross-complaint, R. 33-38);

and where the constitutionality of the gross revenue tax was challenged as contravening clause 3, Section 8, Article I. of the Constitution of the United States, and the due process clause of the Fourteenth Amendment, and, also, the equal protection clause of the Fourteenth Amendment, because the tax was collected to apply on cost of regulating public utilities such as electric power plants, telephones, street railways, steam heating, etc., and not related to the use of the highways at all, because appellant had no revenues except revenues from interstate commerce and the tax was laid by the State as a direct burden upon the Federal privilege of engaging in that commerce, because there was no attempt to segregate a base of interstate revenues for taxation in Montana if such is permissible as compensation for the use of the highways, and because there was no method, formula, or standard specified by the statute or suggested in the statute for apportioning any revenues for taxation, if interstate revenues may be apportioned to the State of Montana for taxation (Secs. K and L, of Cross-complaint, R. 39-44).

(c) In the Motion to Strike filed by appellant against the Reply and Answer of the Board to appellant's Answer and Cross-complaint (R. 70 and 71 (motion) and R. 68. (Reply of Board)) on the ground the gross revenue tax statute was to be construed on the basis of its mandates and not on any gratuitous amelioration of the statute by the Board, absent legislative authority to it.

(d) In Objection by appellant to evidence proffered on the cross-examination of appellant by Board, at trial as follows (R. 83 and 84):

"Q. Now, so far as the year 1939 is concerned, did the Board of Railroad Commissioners of the state of Montana ever demand of your company payment of any fees based on $\frac{1}{2}$ of 1% for the total gross revenue of all of your revenue throughout all states?

"A. Throughout all states?

"Q. Yes.

"A. Not to my knowledge.

"Q. Has it ever made any demand of your company for payment of $\frac{1}{2}$ of 1% on the gross revenue of the entire gross revenue of the company?

"Mr. Toomey: To which objection is made on the ground and for the reason that the statute in question provides that the Board shall collect $\frac{1}{2}$ of 1% of the gross revenue from the carrier, subject to a minimum of \$15.00 per vehicle and that there is no language in the statute and no suggestion in the statute that the tax shall be applicable to any revenues that arise from any part of interstate operations in Montana. And upon the further grounds that under the law, the statute is to be tested not by what the Board actually does under it in administration, but what may be done under the statute.

"The Court: The objection is overruled.

"A. No, not to my knowledge.

By Mr. Matson:

"Q. As a matter of fact, the demand of the Board of Railroad Commissioners, prior to the bringing of this action, was for the minimum under the gross revenue, was it not, the minimum of \$15.00 per vehicle?

"A. It was for the minimum of \$15.00 per vehicle for, I presume, the percentage of our Montana revenue. I don't know that they computed the percentage, and on account of the rather limited operation in the state, I presume they thought they might collect the minimum." (R. 83 and 84).

(e) In the Request of the Board for Findings of Fact and Conclusions of law that both taxes were valid (R. 93-95).

(f) In the detailed Request of appellant for Findings of Fact and Conclusions of law (R. 96-126, in particular, at R. 97, 98, 115, 116, 117, 118, 119, 120, 121, 122) where the asserted grounds of invalidity under the Federal Constitution were again repeated, as in (a), (b), (c) and (d) above, and amplified.

(g) In the Findings of Fact and Conclusions of Law actually entered by the trial court, i.e., that the "flat" or "straight" *\$10.00 per vehicle tax was a valid exercise of legislative authority, and the quarterly gross revenue tax was invalid* because "it fails to specify any method by which the gross operating revenue of the defendant in the State of Montana for any year may be determined" (R. 124-126, in particular Pars. 1, 2 and 3 of Conclusions of Law at pp. 125-126).

(h) In the Assignment of Errors by appellant in its brief on appeal in the Supreme Court of Montana (R. 128-c and 128-d), and,

(i) Finally, in the opinion of a majority of the Supreme Court of Montana, where the constitutional questions were stated and attempted to be examined and attempted to be decided (Appendix A, hereto), albeit that the Supreme Court of Montana said of the quarterly gross revenue tax,

"Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention with which we do not

agree, no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated in the State." (Emphasis ours) Appendix A, p. 18; (R. 238.)

(j) In the opinion of the Supreme Court of Montana, the validity of both taxes, as against the challenges of invalidity under the Commerce Clause (Clause 3, Sec. 8, Article I and the equal protection of the law clause and the due process clause of the Fourteenth Amendment, Constitution of the United States) was affirmed (Appendix A, hereto).

E

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

Two basic questions are presented to the Supreme Court of the United States on this appeal:

First, Is it within the power of the State of Montana under the Commerce Clause and under the Fourteenth Amendment to the Constitution of the United States, to enjoin and prohibit Aero Mayflower Transit Company, a Kentucky corporation, from engaging exclusively in interstate commerce as a contract carrier by motor vehicle on and over the highways of Montana, because the carrier refuses to pay to the Board of Railroad Commissioners of Montana a quarterly tax of one-half of one per cent upon its gross operating revenues as a carrier, where the state statute imposing the tax as alleged compensation for use of the highways of Montana,

(a) levies the tax upon all the gross operating revenues of the carrier, from whatever source derived,

(b) levies the tax necessarily on interstate revenues of the carrier since it has no revenues except revenues

from interstate commerce, and where the statute construed by the Supreme Court of Montana to apply to "the gross revenue derived from operations in Montana . . . and not the company's gross revenue from all sources" contains no method, standard, formula or measure for ascertaining "gross revenue from operations in Montana," and delegates no authority to any agency of the state to make such determination within any limits, and

(c) levies the gross tax without attempt to relate it in any manner to use of the highways.

Second, Is it within the power of the State of Montana under the Commerce Clause and under the Fourteenth Amendment to the Constitution of the United States, to enjoin and prohibit Aero Mayflower Transit Company, a Kentucky corporation, from engaging exclusively in interstate commerce as a contract carrier by motor vehicle on and over the highways of Montana, because the carrier refuses to pay to the Board of Railroad Commissioners of Montana an annual tax of \$10.00 for every motor vehicle operated by the carrier over the highways of Montana, as alleged compensation for use of the highways of Montana, where tax levy revenues

(a) are not "expended" as erroneously stated by the Supreme Court of Montana, "to build, maintain, and supervise highways," but are by the terms of the statute sent to a motor carrier fund where they become available "for the purpose of defraying the expenses of administration of the motor carrier Act, and the regulation of the business of motor carriers described in the Act.

(b) Where the tax is necessarily levied on vehicles in interstate commerce only since the carrier operates no vehicles over the highways of Montana except in interstate commerce.

(c) Where the tax is levied as a condition of the carrier operating exclusively in interstate commerce, at the will of the State, and without reference to the right of the carrier so to operate under the provisions of the Federal Motor Carrier Act.

(d) Where the tax on its face bears no relation to the actual use of the roads and is not used for highway purposes at all.

It is contended that *both* of these basic questions are *substantial*, are highly debatable, and, moreover, are of such a character as to affect interstate motor carriers, common and contract, not only in Montana, but throughout the entire United States, indeed to concern the United States.

It is further contended that these questions have not been decided by the Supreme Court of the United States and that they are not foreclosed by principles enunciated in existing decisions dealing with the right of the State to impose even upon motor vehicles engaged exclusively in interstate commerce a charge as compensation for use of the highways.

The Montana statutes are unique; they are arbitrary. They evince definite hostility to interstate commerce, and they are so artlessly drawn that their pious, self-serving declarations of compensation for use of the highways do not disguise their plain intent to invade the forbidden field of taxing gross revenues from interstate commerce as such, and that is their manifest and inescapable effect.

Nor is this the first time that the State of Montana has evinced a manifest carelessness, if not hostility, in dealing with the subject of interstate commerce. In 1935, the Supreme Court of the United States unanimously condemned a Montana statute imposing an occupation tax on all telephones of an interstate telephone company where the statute

was without regard for the distinction between interstate and intrastate business.

Cooney v. Mountain States T. & T. Co., 294 U. S. 384, 79 L. Ed. 934; see pp. 941-942.

The foregoing opinion ~~was not noticed~~ by the Supreme Court of Montana in the opinion in this case, nor did it notice its own earlier opinion recognizing the force of the opinion by the United States Supreme Court in the *Cooney* case, i.e., *State v. Montana-Dakota Utilities Co.*, 114 Mont. 161, 133 Pac. (2d) 534.

THE FACTS

There is no essential dispute as to the facts. The Supreme Court of Montana said, "There is no dispute as to the facts." (Appendix A, p. 2; R. p. 222). The Supreme Court also found (as noted on pages 10-11 of this Statement of Jurisdiction, above) that appellant used Montana highways only in interstate movements. (Opinion of that Court, Par. 3, Appendix A, page 2; R. 222.)

Appellant set up in its cross-complaint (Sec. E, R. 20, 21, 22, 23, 24 and 25) that it paid the "other taxes" exacted by the State of Montana in 1937, 1938 and 1939, i.e., (a) the Motor Vehicle-Registration and License Plate Taxes (Sections 1760-1760.10, Revised Codes of Montana, 1935) and (b) the 5¢ per gallon gasoling tax out of which the public highways of Montana are constructed; with aid from the United States of America (Sections 2381.1-2396.9, Revised Codes of Montana, 1935; and Initiative Measure No. 41, known as "The State Highway Treasury Anticipation Debentures Act of 1939" (Laws of 26th Session, Montana Legislative Assembly, at page 743, as amended by Chapter 30, Laws of 1939, at page 40, same volume) and it proved such facts at the trial (R. 76-80). Appellant also exposed

its use of Montana highways in 1937, 1938 and 1939, by Section D of its cross-complaint (R. 18-20) and proved such use on trial (R. 82). Hence, there is no obscurity in the facts, and the questions stated remain for final answer on this appeal, as applied to one who operates exclusively in interstate commerce who has no revenues from any source except interstate commerce, and which revenues the State assumes to tax under compulsion of stopping and prohibiting such a one from carrying on interstate commerce, if such taxes are not paid.

Appellant asserts that the Supreme Court of the United States has never decided that a state may tax gross revenues from interstate commerce as a condition of the state permitting that commerce to be carried on over its highways, whatever the purpose, and that is what is done by the statute imposing the gross revenue tax in question.

Appellant further asserts that there is utterly no foundation in the language of the statute imposing the gross revenue tax for the Supreme Court of Montana concluding that the tax applies to "gross revenue derived from operations in Montana," whatever those words may mean, and that, in any event, the legislature has wholly failed to provide (nor did the court invent or supply) any standard, method, formula or principle for ascertaining "gross revenue derived from operations in Montana."

The result is that the statute is a naked, arbitrary command to "pay a tax on gross revenue or keep off the highways of Montana," uttered by an administrative board from whom the legislature has withheld any means of ascertaining or computing the tax, to provide a method of ascertainment. The Board is reduced to the position where it must say, "Pay us a tax of $\frac{1}{2}$ of 1% on gross revenues derived from operations in Montana, on some basis we invent, or do not engage in interstate commerce over the highways of Montana."

Appellant respectfully suggests that if that power is sustained then the great constitutional purpose of the Commerce Clause is brought to naught, and brought to naught by a power which knows no bounds. The Supreme Court of Montana sought to salvage the gross revenue tax, but it could not itself invent an apportionment device, so it concluded, in effect, "Well, anyhow the \$15.00 minimum is ascertainable." That minimum, however, has no existence apart from the invalid gross revenue measure.

That a substantial Federal question is presented is demonstrated by these cases:

McCullough v. Maryland, 4 Law Ed. 579; 4 Wheaton 316;

Gibbson v. Ogden, 6 Law Ed. 23, 9 Wheaton 1;

Smith v. Turner and Norris v. City of Boston, 12 Law Ed. 702, 7 Howard 783;

Cook v. Pennsylvania, 97 U. S. 566, 24 Law Ed. 1015;

Fargo v. Michigan (*Fargo v. Stevens*) 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857, 1 Inters. Com. Rep. 51;

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 St. Ct. 1118, 1 Inters. Com. Rep. 308;

Leloup v. Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 Sup. Ct. 1380;

Galveston H. & S.A.R. Co. v. Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638;

Meyer v. Wells, F. & Co., 223 U. S. 298, 56 L. Ed. 445, 32 S. Ct. 218;

Williams v. Talladega, 226 U. S. 404, 419, 57 L. Ed. 275, 33 Sup. Ct. 116;

Minnesota Rate Cases (*Simpson v. Shepard*), 230 U. S. 352, 400, 57 L. Ed. 1511, 1541, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18;

Crew, Lerick Co. v. Pennsylvania, 245 U. S. 292, 62 L. Ed. 295, 38 Sup. Ct. 126;

United States Glue Co. v. Oak Creek, 247 U. S. 321, 328, 62 L. Ed. 1135, 1141, 38 Sup. Ct. 499, Ann. Cas. 1918E, 748;

Sprout v. South Bend, 277 U. S. 163, 171, 72 Law Ed. 833, 48 Sup. Ct. 562;

New Jersey Bell Tel. Co. v. State Bd. of Taxes & Assessments, 280 U. S. 338, 349, 74 L. Ed. 463, 469, 50 Sup. Ct. 411;

East Ohio Gas v. Tax Commission, 283 U. S. 465, 75 Law Ed. 1171, 51 Sup. Ct. 499;

Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 655, 80 Law Ed. 956, 959, 56 Sup. Ct. 608;

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90, ante, 64, 58 Sup. Ct. 72;

Western Live Stock v. Bureau of Revenue, No. 322, October Term, 1937 (303 U. S. 250, ante, 828, 58 Sup. Ct. 546, 115 A. L. R. 944);

Adams Mfg. Co. v. Storen, 304 U. S. 307, 82 Law Ed. 1365;

Gwin, White & Prince v. Hanneford, 305 U. S. 434, 83 Law Ed. 272;

Best & Company v. Maxwell, 311 U. S. 454, 85 Law Ed. 274;

Nippert v. Richmond, 90 U. S. S. C., Advance Opinions 9.

In the following cases, the doctrine that the State may not exact a "flat" or "straight" fee, not devoted to highway use, and not related to cost of supervision of an exclusive interstate carrier is applied or recognized:

Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199;

Interstate Busses Corp. v. Blodgett, 276 U. S. 551;

Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. Ed. 704, 708;

Interstate Transit Inc. v. Lindsey, 283 U. S. 183, 75 L. Ed. 953;

In *Aero Mayflower Transit Co. v. Ga. Pub. Comm.*, 295 U. S. 286, 79 L. Ed. 1439 while a flat tax of \$25.00 a year per truck was held valid, *the money actually went into a fund for upkeep of highways*; no gross revenue tax was involved.

Ingels v. Morf, 300 U. S. 290, 81 L. Ed. 653;

Dixie Ohio Express Co. v. State Revenue Commission, 306 U. S. 72, 83 L. Ed. 495;

McCarroll v. Dixie Greyhound Lines, Inc., 309 U. S. 176, 84 L. Ed. 683.

And see the discussion by Lockhard in "Gross Receipts on Interstate Transportation and Communications" in 57 Harvard Law Review 40.

If treated as an inspection fee, the Montana gross revenue tax ~~is invalid~~ because the state did not assume to discharge the burden upon it of showing the sums collected from the carrier for the common pot of the public service commission did not exceed what is reasonably needed for inspection and supervision service accorded appellant.

Foot & Co. v. Stanley, 232 U. S. 494, 58 L. Ed. 698, 34 Sup. Ct. 377.

Great Northern Ry. Co. v. Washington, 300 U. S. 154, 81 Law Ed. 573, 57 Sup. Ct. 397 (in this case the Washington statute reviewed, enacted in 1929 is so similar to the Montana statute as to suggest that it may well have been its progenitor.)

Taxes laid on interstate commerce without apportionment, or where inadequately apportioned are uniformly held invalid:

Norfolk & Western R. Co. v. Pennsylvania, 136 U. S. 114; 34 Law Ed. 394; 10 Sup. Ct. 958;

Allen v. Pullman's Car Co., 191 U. S. 171; 48 Law Ed. 134, 24 Sup. Ct. 39;

Fargo v. Hart, 193 U. S. 490; 48 Law Ed. 761, 24 Sup. Ct. 498;

Union Transit Co. v. Kentucky, 199 U. S. 194; 50 Law Ed. 150, 26 Sup. Ct. 36;

Union Tank Line Co. v. Wright, 249 U. S. 275; 63 Law Ed. 602, 39 Sup. Ct. 276;

Wallace v. Hines, 253 U. S. 66; 64 Law Ed. 782, 40 Sup. Ct. 435;

Southern Ry. Co. v. Kentucky, 274 U. S. 76; 71 Law Ed. 394, 47 Sup. Ct. 542;

Johnson Oil Co. v. Oklahoma, 290 U. S. 158, 78 Law Ed. 238, 54 Sup. Ct. 152.

And see, particularly, *Freeman, Trustee v. Hewit*, Director of Gross Income, etc., decided this December 16th, 1946, and cases there cited. — U. S. —, No. 3, October Term, 1946.

The following decisions of the Supreme Court of the United States are believed to sustain the jurisdiction of that Court on a direct appeal to review the final order, judgment or decree here in question:

Bush Co. v. Maloy, 267 U. S. 317, 69 Law Ed. 627; 45 Sup. Ct. 326;

Sprout v. South Bend, 277 U. S. 163, 72 Law Ed. 833, 48 Sup. Ct. 502;

Interstate Transit v. Lindsey, 283 U. S. 183, 75 Law Ed. 953, 51 Sup. Ct. 380;

Guin, White & Prince v. Henneford, 305 U. S. 434, 8
Law Ed. 272, 59 Sup. Ct. 325;

Butler Bros. v. McColgan, 315 U. S. 501, 86 Law Ed.
991, 62 Sup. Ct. 701.

Respectfully submitted,

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APPENDIX "A"

STATE OF MONTANA, IN THE SUPREME COURT, JUNE TERM, 1946

No. 8646

BOARD OF RAILROAD COMMISSIONERS of the State of Montana,
PAUL T. SMITH, LEONARD C. YOUNG and HORACE F. CASEY,
as members of and constituting the Board of Railroad
Commissioners of the State of Montana, Plaintiffs and
Appellants on Appeal of said Board, and Respondents
on Cross-Appeal of Aero Mayflower Transit Company,
a corporation,

vs.

AERO MAYFLOWER TRANSIT COMPANY, a Corporation, De-
fendant and Respondent on Appeal of said Board, and
Appellants on Cross-Appeal of Aero Mayflower Transit
Company, a corporation.

Submitted: April 13, 1946.

Decided: June 29, 1946.

Filed: June 29, 1946.

Dissent Filed: Sept. 19, 1946. Frank Murray, Clerk.

Mr. Justice Morris delivered the Opinion of the Court.

This controversy involves the question as to what extent a state may impose burdens in the way of licenses and taxes upon motor carriers engaged in interstate commerce for operating their vehicles over the highways of the state. Such exactions are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways.

The Board of Railroad Commissioners of the State of Montana, hereinafter referred to as the Board, brought this suit to restrain the Aero Mayflower Transit Company, a Kentucky corporation, hereinafter referred to as the Company, from operating its motor vehicles over the high-

ways of the state until it shall have complied with the provisions of Chapter 310 of the Political Code, known as the Motor Carriers Act, comprising sections 3847.1 to 3847.28 of the Revised Codes, inclusive. A restraining order was issued as prayed for by the Board, and the Company for some months discontinued operations in the state, but later filed a bond with the court and the court made an order permitting the Company to continue operations pending determination of the issues involved.

There is no dispute as to the facts. The Company is engaged in the motor transportation of used or second hand household goods and office furniture from one state to another for hire. It does not transport any goods of any nature or kind from one point to another in the same state. The only transportation it engages in so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state. It alleges that it operates under permit No. 2934 issued to it by the Interstate Commerce Commission. It appears that in October 1935 the Board issued to the Company a "Class C" permit. In September 1939 the Board issued an order directing the Company to show cause why its permit to operate its vehicles over the highways of Montana should not be revoked. A hearing followed on October 6, 1939, and on the succeeding 9th of October the Board issued an order cancelling the permit theretofore issued to the Company on the ground that the Company was using the highways of the state "In an unlawful and unauthorized" manner. The position of the Board appears to be that the Company may not use the highways of the state until it shall have applied to the Board and been granted a permit and paid the taxes and fees imposed by statute.

To the complaint of the Board in the instant action the Company interposed both a special and general demurrer, and such demurrers being overruled, the Company answered by way of general denial followed by cross-complaint. The cross-complaint at great length sets out the various acts of the parties showing the conflicting views of each which gave rise to the issues involved in the action. Briefly stated the Company contends that the Motor Car

riers Act, *supra*, is not applicable to interstate commerce, but governs those engaged in intrastate commerce only; that sections 3847.16 and 3847.17, if applied to it, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and sections 1 and 11 of Article XII of the Constitution of Montana.

It appears that the state has heretofore and for some years collected two separate exactions from the Company; The Registration License Tax authorized by sections 1760-1760.10, Revised Codes; and the tax on sales of gasoline, authorized by sections 2381.1 to 2396.9, Revised Codes. The further exactions challenged by the Company in this action are (a) the "Ten Dollar per vehicle 'straight' or 'flat' tax," authorized by sections 3847.16 and 3847.17, Revised Codes, and (b) "The tax of one-half of one per cent of the amount of *gross revenue*, from wherever derived by the defendant in the United States, under section 3847.27," which is the construction the Company places upon that section, with a minimum fee of \$15.00 for each vehicle operated by the Company in Montana.

While there is but one set of findings of fact, conclusions of law, and a single judgment, two separate actions were entered on the docket in the lower court, action No. 38175 in which the Board was the complainant, and action No. 38765 in which the Company was the complainant. When the actions came on for hearing the parties stipulated in open Court that the actions might be combined and tried as one, it being agreed that the issues in the two actions were practically the same.

The combined action was tried to the court sitting without a jury. The pleadings by the Company contained practically all the record facts involved in the controversy between the parties relative to the orders made by the Board and sundry hearings had before it. All the evidence adduced at the hearing before the trial court consisted of a brief examination of the counsel and chairman of the Board and the examination of the Vice-President and Manager of the Company. When both parties rested, the matter was submitted on briefs, and both parties later submitted proposed findings of fact and conclusions of law. The court made and entered its own findings of fact and conclusions of

law, and made and entered its amended judgment, it having been found that the judgment first entered did not follow the findings of fact and conclusions of law. By conclusion of law number 2 the court held that section 3847.16, Revised Codes, "is a valid exercise of legislative authority and should be obeyed." By the amended judgment the Company was restrained and enjoined from operating its motor vehicles over the highways of the state of Montana until it shall have paid the amounts due the state as demanded under section 3847.16, Revised Codes, as follows: for the year 1938, \$250.00; for the year 1939, \$400.00; for the year 1940, \$440.00, with interest on the respective amounts from the first day of January of each year mentioned until paid, with costs to the Board. It was "further ordered, adjudged and decreed that said Board be and it is enjoined and restrained from enforcing or applying against defendant any of the provisions of section 3847.27, Revised Codes of Montana, 1935, and in particular from exacting any of the fees and taxes therein specified." Both the Board and the Company appealed from that part of the judgment adverse to it. The effect of the judgment of the trial court is to overrule the Company's contention that section 3847.16 is invalid as in conflict with the commerce clause of the Federal Constitution, and the Constitution of Montana.

The effect of the trial court's order enjoining the Board from enforcing any of the provisions of section 3847.27, Revised Codes, is to relieve the Company from the obligation to comply with the Board's demand to pay the tax of one-half of one percent of its gross revenue or the minimum fee of \$15.00 on each vehicle operated over the roads of the state.

Of the nine specifications of error assigned by the Company, the first is upon the court's overruling its demurrer to the complaint. The Company by its demurrer contends that as the Board is purely a creature of a statute it has no power to sue; that by reason of the provisions of section 3806, Revised Codes, the state is a necessary party to these actions. The Board of Railroad Commissioners is created and its powers enumerated by Chapter 309 of the Political Code, comprising sections numbered 3779 to 3847 inc., Revised Codes, and Chapter 310 as heretofore men-

tioned is the Motor Carriers Act. By section 3847.8 of the latter chapter, the enforcement of the Motor Carriers Act is vested in the Board of Railroad Commissioners. It is true, as contended by the Company, that section 3806 provides actions to enforce the Board's regulations under the law shall be brought by the Attorney General in the name of the state, but section 3847.14 of the Motor Carriers Act provides in part, "Orders and final determinations of the board in all proceedings pursuant to the provisions of this act shall be enforced in the manner provided for the enforcement of orders of the board of railroad commissioners by the provisions of chapter 309 of the political code, and laws amendatory thereof. Provided, further, that if any motor carrier shall operate in violation of the provisions of this act, or shall fail or neglect to obey any lawful order of the board, *the board or any party injured may* apply to any court of competent jurisdiction, in any county where such motor carrier is engaged in business, for the enforcement of this act or such order; and the court shall enforce obedience thereto by writ of injunction, or other proper process, mandatory, or otherwise, and to restrain such carrier, its officers, agents, employees, or representatives from further violation of this act, or such order, or to enjoin upon it, or them, obedience to the same." We think this section must be construed along with section 3806, supra, and being a later enactment controls and modifies section 3806, and that the Board is authorized to maintain this action.

Specifications of error Nos. 2 and 3 are on alleged error of the court in refusing to adopt the findings of fact and conclusions of law proposed by the Company. Such proposed findings and conclusions are predicated upon the contention that as the Company is engaged in interstate transportation only the legislative acts under which the Board assumes to enforce the exactions in the way of fees and taxes are acts which apply exclusively to motor carriers engaged solely in intrastate commerce. In this connection the Company contends that section 3847.16, Revised Codes, is null and void by reason of its conflict with the Fourteenth Amendment to the Constitution of the United States and with section 27 of Article III, the due process.

clause, of the Constitution of Montana, and it is further contended that the fees and licenses which the Board demands the Company shall pay may, under the statute, be used for other purposes than improvement and maintenance of the highways of the state, and that when such exactions in the way of taxes and licenses are imposed upon the Company for other purposes they become in effect exactions on interstate commerce and section 3847.16, Revised Codes, is therefore illegal and void as to the plaintiff, being in violation of Clause three of section 8, Article I of the Constitution, the commerce clause, of the United States.

Mr. Justice Brandeis, speaking for the court, clearly stated the rule applicable to the relative rights and power of the Federal Congress and state legislatures in regard to providing rules and regulations and imposing exactions in the way of fees, licenses and taxes on motor carriers in the case of *Interstate Transit, Incorporated v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, a case arising under an act of the legislature of the state of Tennessee imposing a tax upon concerns operating interstate motor busses on the highways of the state. The controversy involved "a privilege tax graduated according to carrying capacity." A tax of \$500 a year was imposed upon each vehicle seating more than twenty and less than thirty passengers. The motor company made a quarterly payment under protest and brought suit to recover the amount paid on the ground that the statute applied violated the commerce clause of the Federal Constitution. The trial court allowed recovery, but its judgment was reversed by the Supreme Court of the state and the case was appealed to the Supreme Court of the United States as above indicated. Justice Brandeis said: "While a state may not lay a tax on the privilege of engaging in interstate commerce, *Sprout v. South Bend*, 277 U. S. 163, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. *Kane v. New Jersey*, 242 U. S. 160, 168-169; *Clark v. Poor*, 274 U. S. 554; *Sprout v. South Bend*, supra, pp. 169-170. As such a charge is a direct burden on interstate commerce, the tax cannot

be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, or by the express allocation of the proceeds of the tax to highway purposes, as in *Clark v. Poor*, *supra*, or otherwise where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. *Hendrick v. Maryland*, 235 U. S. 610, 612; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 250-252. Compare *Interstate Busses Corp. v. Holyoke Street Ry.*, 273 U. S. 45, 51.

"The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting section 4 of the 1927 Act with those statutes which admittedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon. The former declares specifically in connection with the privilege tax on interstate busses that the proceeds 'shall go and belong exclusively to the General Funds of the State.' On the other hand, in the legislation by which Tennessee has provided for defraying the cost of constructing and maintaining the state highways and regulating motor traffic, it has been the consistent practice to prescribe that moneys raised for this purpose shall be segregated and go into the Highway Fund. The present system of motor regulations was inaugurated in 1915. At the same session, the legislature created a State Highway Commission with power to construct and maintain highways. In these statutes and in many later ones—prescribing additional fees for the registration and licensing of motor vehicles, imposing gasoline taxes, laying a one mill road tax, and authorizing the issue of bonds for the construction of highways and bridges, the legislature provided that the proceeds of the fees, taxes, and bonds, and of the tolls collected on bridges, should be set apart as state highway and bridge funds to be expended by the Commission exclusively for the construction and

maintenance of highways or bridges. The absence in Section 4 of this provision, which characterizes almost every other Tennessee statute relating to the construction and maintenance of highways or the regulation of motor vehicle traffic, is additional evidence that the present tax was not exacted for such purposes, but merely as a privilege tax on the carrying on of interstate business.

"It is suggested that a tax on busses graduated according to carrying capacity is common and is a reasonable measure of compensation for use of the highways. It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce. Being free to levy occupation taxes, States may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways. Compare *Gundling v. Chicago*, 477 U. S. 183, 189. But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State. *Clark v. Poor*, supra. In the present act the amount of the tax is not dependent upon such use. It does not arise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the carrying capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

In an annotation in 135 A.L.R. 1358, it is said: " . . . it is well settled that in the absence of Federal legislation especially covering the subject, a state may prescribe regulations governing the use of motor vehicles on its highways,

providing such regulations do not impose undue burdens on interstate commerce, and are reasonable and not discriminatory."

In the case of *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734, the question of the right of the state to restrict the width of motor vehicles operated on the state highways and the gross load carried, was involved. Mr. Justice Stone, speaking for the court, said: "Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints.

"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 498; *Caldwell v. North Carolina*, 187 U. S. 622, 626. It was to end these practices that the commerce clause was adopted. See *Gibbons v. Ogden*, 9 Wheat. 1, 187; *Brown v. Maryland*, 12 Wheat. 419, 438-439; *Cooley v. Board of Port Wardens*, supra; *State Freight Tax*, 15 Wall. 232, 280; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 289, 297-298; *Cook v. Pennsylvania*, 97 U. S. 566, 574; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217; *Baldwin v. Seelig*, 294 U. S. 511, 522; *H. Farrand*. . . . Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. . . . Unlike the railroads, local highways are built, owned and maintained by the state or its municipal

subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse. * * *

"The nature of the authority of the state over its own highways has often been pointed out by this Court. It may not, under the guise of regulation, discriminate against interstate commerce. But 'In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' *Morris v. Duby*, 274 U. S. 135, 143. This formulation has been repeatedly affirmed, *Clark v. Poor*, 274 U. S. 554, 557; *Sprout v. South Bend*, 277 U. S. 163, 169; *Sproles v. Binford*, 286 U. S. 374, 389, 390; cf. *Morf v. Bingaman*, 298 U. S. 407, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. * * * Restrictions favoring passenger traffic over the carriage of interstate merchandise by truck have been similarly sustained, *Sproles v. Binford*, supra; *Bradley v. Public Utilities Comm'n*, 289 U. S. 92, as has the exaction of a reasonable fee for the use of the highways. *Hendrick v. Maryland*, 233 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245; *Morf v. Bingaman*, supra; cf. *Ingles v. Morf*, 300 U. S. 290.

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states. * * *

"When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. *Jacobson v. Massachusetts*, 197 U. S. 11, 30; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365; *Price v. Illinois*, 238 U. S. 446, 451; *Hadacheck v. Sebastian*, 239 U. S. 394, 408-414; *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388; *Zahn v. Board of Public Works*, 274 U. S. 325, 328; *Standard Oil Co. v. Marysville*, 279 U. S. 582, 584. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. *Morris v. Doby*, supra, 143; *Sproles v. Binford*, supra, 389, 390; *Minnesota Rate Cases*, supra, 399, 400; *Smith v. St. Louis & S. W. R. Co.*, 181 U. S. 248, 257; *Reid v. Colorado*, 187 U. S. 137, 152; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 42, 43."

The foregoing authorities clearly establish the right of the state to impose upon motor carriers engaged in interstate commerce exactions by way of taxes and licenses for use by such motor carriers of the state highways when such exactions are necessary to build, maintain, and supervise the highways. In addition the exactions must be such as are reasonably necessary for the purposes mentioned, and must not be discriminatory as between state and interstate carriers. It further appears to be the established rule of the federal courts to require the interstate carrier who challenges the right of the state to impose such licenses and taxes to affirmatively show that the exactions demanded are not necessary for the purposes mentioned or are discriminatory. In other words the burden is on the carrier to show wherein the exactions are unlawful as to him.

Adverting to the contention of the company that section 3847.27 is invalid, the trial court having so held, the Board contends the court's holding was erroneous.

The company's position is that as section 3847.23, Revised Codes, provides in part that it shall not be necessary for an interstate motor carrier to make any showing of public convenience and necessity in order to obtain a permit to operate in Montana, that it therefore necessarily follows that the company being an interstate carrier section 3847.27 does not apply to it, but only to intrastate carriers. To the contention that the Motor Carriers Act does not apply to the company, we do not agree. The Act was obviously intended to apply to all motor carriers operating over the highways of the state. See section 3847.1 (h) and 3847.16, Revised Codes. It clearly appears that the legislature was aware of decisions of the Supreme Court of the United States with which the Act might conflict and endeavored to have the Act so drawn as to meet such a situation. By section 3847.24 of the Act provision is made by which if any part or provision is found to be unconstitutional it shall not affect the validity of the balance of the Act. Certain parts of section 3847.23, *supra*, were obviously incorporated in the Act for the same purpose, particularly that part of such section which provides that it shall be unnecessary for any interstate motor carrier to make any showing of public convenience and necessity in order to obtain a state permit. However, elimination of the part of section 3847.23 to which we have just referred does not abate the tax imposed by section 3847.27, Revised Codes. The company in support of its contention that Chapter 310 was designated to control intrastate motor carriers only, cites *Buck v. Kuykendall*, 267 U. S. 307, and *Bush & Sons Company v. Maloy*, 267 U. S. 317; twin cases, the opinion in both being delivered by Mr. Justice Brandeis. Both were rendered in January, 1925, and the Motor Carriers Act was not enacted until 1931, six years later.

In the first case Buck desired to operate an auto stage line for hire between Portland, Oregon, and Seattle, Washington. Oregon granted Buck a certificate of public convenience and necessity, but the state of Washington refused such a certificate. When the case in the course of litigation reached the Supreme Court of the United States, it was held that "the Washington statute is a regulation, not of the use of its highways, but of interstate commerce. Its

effect upon such commerce is not merely to burden but to obstruct it." That conclusion was predicated upon the proposition that the "primary purpose (of the statute requiring such a certificate) is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner." The decision in the Bush case was practically to the same effect and on similar facts. It is obvious that the two decisions were based upon the ground of unlawful discrimination. There is no showing of discrimination in the case at bar. All motor carriers are made subject to the same regulations, under our Motor Carriers Act.

The trial court held in the case at bar, "That section 3847.27, Revised Codes of Montana, 1935, as applied to the defendant is invalid for the reason that it fails to specify any method by which the gross operating revenue of the defendant in the state of Montana for any year may be determined, and for the further reason that the Public Service Commission for the state of Montana mentioned as the administrative body in sections 3847.26, 3847.27 and 3847.28, Revised Codes of Montana 1935, has nothing to do with the regulation and supervision of motor carriers using the public highways of the State of Montana."

On the question of the constitutionality of section 3847.27, this court said in the case of *State v. Stark*, 100 Mont. 365, 52 Pac. (2d) 890, that, "In determining whether an Act of the legislative assembly is invalid or not, it has long been the established rule of this court that the constitutionality of any act shall be upheld if it is possible to do so (*State ex rel. Tipton v. Erickson*, 93 Mont. 466, 19 Pac. (2d) 227; *Hale v. County Treasurer*, 82 Mont. 98, 105, 265 Pac. 6), and that a statute 'is prima facie presumed' to be constitutional, and all doubts will be resolved in favor of its validity. (*State ex rel. Toomey v. Board of Examiners*, 74 Mont. 1, 238 Pac. 316, 320). The invalidity of a statute must be shown beyond a reasonable doubt before this court will declare it to be unconstitutional. (*Herrin v. Erickson*, 90

Mont. 259; 2 Pac. (2d) 296).. And a statute will not be held unconstitutional unless its violation of the fundamental law is clear and palpable. (*Hill v. Rac*, 52 Mont. 378, 158 Pa. 826, Ann. Cas. 1917E, 210 L. R. A. 495)."

By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, *State v. Bowker*, 63 Mont. 1, 205 Pac. 961, it becomes clear that the clause in section 3847.27 imposing upon the company a tax of one-half of one per cent. based upon its "gross operating revenue" that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16 which is as follows:

"When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state."

"The legislative intention . . . is controlling." *State v. Smith*, 57 Mont. 563, 574, 190 Pac. 107, and cases cited. There could have been but one purpose in incorporating paragraph (b) in section 3847.16, namely, to ascertain the gross revenue derived by the company's operations in Montana in order to use that as a basis for the levy of the tax of one-half of one per cent.

It was said in *United States v. Freeman*, 3 Howard 565, (44 U. S. 548), "A thing which is within the intention of the makers of the statute, is as much within the statute as if it were in the letter." Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention

to which we do not agree, no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated within the state.

Furthermore, in this connection it is our opinion that when the legislature enacts a statute imposing the duty of enforcement of such statute upon a particular board or officer of the state but fails or neglects to clearly prescribe and incorporate in the Act the mode of enforcement, that such officer or board may adopt any fair and reasonable mode of enforcement designed to effectuate the purposes of the Act. In other words, when a duty is imposed upon a particular officer or board in express terms such other duties are implied as are necessary to carry into effect those that are expressed.

Such, we think, is the effect of the rule laid down in the case of *Morse v. Granite County*, 44 Mont. 78, 119 Pac. 286, and followed in *Fisher v. Stillwater County*, 81 Mont. 31, 261 Pac. 607; *Arnold v. Custer County*, 83 Mont. 130, 269 Pac. 396, and *State v. Stark*, 100 Mont. 363, 52 Pac. (2d) 890.

We do not agree with the trial court that the Public Service Commission "has nothing to do with the regulation and supervision of motor carriers using the public highways." The functions and duties of the Board relative to railroads, motor carriers, common carriers of oil, the inspection of boats and supervision of navigation, and public utilities, are closely related and the administration of the whole is upon a Board composed of the same three persons, and by reference many of the rules and regulations expressly applicable to one are also made applicable to another. The accounts and finances relating to each of these legislative Acts must of course be kept separate and distinct, but all are under the same management and we see no sound reason why the same overall board, while convened for the purpose of dealing with some railroad problem, may not at the same time dispose of questions relating to motor carriers or any other duty imposed upon the Board. The necessity of having minutes of such meetings kept separately as to the particular things done does not affect the

powers of the Board to dispose of, at the same time, other duties coming under its supervision.

The terms "Board of Railroad Commissioners" and "Public Service Commission" are used interchangeably and we think it was the legislative intent by section 3847.27 to use the words "Public Service Commission" as including the "Board of Railroad Commissioners." If this were not so, then section 3847.27 would have no meaning whatsoever, since strictly speaking the Public Service Commission does not issue certificates of public convenience and necessity.

The company contends that in fixing the exactions imposed upon it, no distinction is made between large and small vehicles, or heavy and light loads, nor the number of miles travelled over the highways. There is merit in this contention. The heavier the load and the greater the number of miles travelled the greater the wear and tear on the roadway. It is obvious that the tax set up in section 3847.27 was for the purpose of meeting this situation. A short trip and a light load would bring the carrier but little revenue whereas the heavier traffic and longer hauls would produce more revenue and require more taxes. Some discrimination may arise from the tax but in that respect we refer to what was said in *Hilger v. Moore*, supra, where at page 176 we find in the case of *Travelers Ins. Co. v. Connecticut*, 185 U. S. 364, 371, 46 L. Ed. 949, 22 Sup. Ct. Rep. 673, 676, this rule applied: "But, further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents."

Again it is contended that revenue is demanded from the Company to be used to pay salaries of the Board members

and for other alleged unlawful purposes. We think a full and complete answer to all such contentions is found in the case of *Clark v. Poor*, 274 U. S. 554, at pages 556-557, where Mr. Justice Brandeis, speaking for the court, said: "The plaintiffs claim that, as applied to them, the Act violates the commerce clause of the Federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the State; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, . . . for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to ensure safety and convenience and the conservation of the highways. *Morris v. Duby*, ante, [271 U. S. 135] p. 135; *Hess v. Pawloski*, ante, [274 U. S. 352] p. 352. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160. Compare *Packard v. Banton*, 264 U. S. 140, 144.

"There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce. It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." To the same effect is *Dixie Ohio*

Express Co. v. State Revenue Comm. of Georgia, 306 U. S. 72, 83 L. Ed. 495.

In differentiating between the numerous decisions of the United States Supreme Court wherein questions involving interstate commerce were considered and determined it is important to keep in mind that actions involving the use of state highways for the purposes of interstate commerce have no relation to actions relating to railroads, telephone or telegraph lines, sleeping car or freight line owners, where all such facilities are owned by the particular public utility, and motor carriers operating over highways owned by the state. In the case at bar Montana owns the highways over which the company operates its vehicles and the taxes imposed are for the use of the state highways. The revenue collected is devoted to the building, repairing and policing of such highways, and that which the state furnishes is an aid, not a burden to interstate commerce.

The judgment of the lower court in restraining the Company from operating its vehicles over the highways of Montana until it shall have paid the exactions imposed pursuant to section 3847.16, Revised Codes, as set out in such judgment, is affirmed. As to the order of the lower court restraining the Board from enforcing the exactions imposed upon the Company by section 3847.27, Revised Codes, the cause is remanded with instructions to vacate and set aside such order, and enter judgment in favor of the Board in accordance with this opinion.

C. F. MORRIS,
Associate Justice.

We concur:

CARL LINDBQUIST,
Chief Justice;

HUGH R. ADAIR,

ALBERT H. ANGSTMAN,
Associate Justices;

Mr. Justice Cheadle:

Because of lack of time to study the foregoing decision, due to recess by the court, I reserve my opinion with the

understanding that it shall become a part of the foregoing, or a dissent thereto.

EDWIN K. CHEADLE,
Associate Justice,

Mr. Justice Cheadle dissenting:
Filed Sept. 19, 1946.

FRANK MURRAY,
Clerk of Supreme Court,
State of Montana.

The majority opinion is based upon and attempted to be supported by the fallacious premise that the exactions in question "are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways." I can find no support for any such presumption. I fully appreciate the problem of maintaining our highways, and the necessity of exacting a fair compensation for their use by foreign-owned trucks, but I cannot, as a matter of expediency, lend my support to the exaction of such compensation by judicial edict.

Section 3847.27, Revised Codes, provides: "In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall . . . file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)."

Section 3847.28 provides: "All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. * * *". Disposition of this fund is directed by section 3847.17, as follows: "Such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the businesses herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the 'motor carrier fund.' * * *".

Since the defendant company is engaged solely in interstate commerce, three questions involving the interpretation of the quoted sections immediately present themselves, viz.: 1. Does section 3847.27 include only motor carriers holding a certificate of public convenience and necessity, or does it contemplate all motor carriers? Section 3847.23 contains the provision "that it shall not be necessary for any interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing of public convenience and necessity, except as to the transportation of passengers and/or freight between points within this state * * *". It would seem that the wording of section 3847.27 restricts the operation of that section to motor carriers to those holding certificates of public convenience and necessity. The defendant company, being engaged only in interstate commerce, is not included within such class.

2. In computing the amount of the exaction prescribed by section 3847.27 (one-half of one per cent of the amount of the gross operating revenue), what is to be the measure of the gross operating revenue of the carrier employed only in interstate commerce? Is it to be based upon the proportionate mileage travelled over Montana highways of the aggregate distance travelled by the vehicle? Or shall it be calculated upon the gross revenue of the carrier from all sources? If the provisions of this section were intended to include interstate motor carriers, it is apparent that the gross operating revenue, from whatever source, must be

the yardstick of the exaction. Such an exaction would be so manifestly unfair, discriminatory and unreasonable as to impel the conclusion that the legislature did not intend the inclusion of strictly interstate carriers. It is urged that the practice of the plaintiff board has been to exact only the minimum fee prescribed. But such is only a minimum, and is not an alternative exaction; and the test to be applied, of course, is what might be done under the statute, not what has been done.

3. Does the purpose for which the tax is collected and applied constitute an interference with and a burden upon interstate commerce, prohibited by the federal Constitution and statutes, as defined by the Supreme Court of the United States? The majority opinion quotes extensively from the leading case of *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953. But it would seem to me that the holding of that case refutes, rather than supports the conclusion arrived at here. As quoted in the majority opinion, Justice Brandeis in his opinion said: "While a state may not lay a tax on the privilege of engaging in interstate commerce, *Sprout v. South Bend*, 277 U. S. 163, it may impose upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon.

* * * As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, * * * or by the express allocation of the proceeds of the tax to highway purposes, * * * or otherwise where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. 3* * *

Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard as to whether the charge imposed represents

merely a fair compensation for the use of their highways.

But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charges must be necessarily predicated upon the use made, or to be made, of the highways of the state. * * * In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

For two reasons, then, it is apparent that the imposition in question is not, and was not intended to be, exacted as compensation for use of state highways by interstate motor carriers. First, the act specifically provides that the funds derived shall be used for defraying the expenses of the board of Railroad Commissioners in administering the Motor Carriers Act. This court will take judicial notice of the fact that the building and maintenance of state highways, and regulation of traffic thereon, is a function of the state highway department, and entirely foreign to the prescribed functions and powers of the Railroad Commission. Secondly, the amount and character of the attempted imposition bear no relation to the only purpose for which such imposition would be valid, that is, as compensation for use of the state highways. And this is so no matter which method is applied in determining the gross operating revenue. As in the Lindsey case, this exaction is proportioned only to the earnings of the vehicle. I think there can be no question but that the state has power, by appropriate legislation, to require compensation for the use of its highways

by vehicles engaged in interstate commerce. I further think that such legislation must emanate from the legislative arm of the state government. This court may, perhaps, point out that the state is overlooking a possible source of revenue for the maintenance of its highways, but may not enact the legislation for the purpose of its collection, under the guise of judicial interpretation.

EDWIN K. CHEADLE,
Associate Justice.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 8646

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, Paul T. Smith, Leonard C. Young and Horace F. Casey, as members of and constituting the Board of Railroad Commissioners of the State of Montana, Plaintiffs and Appellants on Appeal of said Board, and Respondents on Cross-Appeal of Aero Mayflower Transit Company, a corporation,

VS.

AERO MAYFLOWER TRANSIT COMPANY, a corporation, Defendant and Respondent on Appeal of said Board, and Appellant on Cross-Appeal of Aero Mayflower Transit Company, a corporation.

PETITION BY AERO MAYFLOWER TRANSIT COMPANY FOR REHEARING

Comes now Aero Mayflower Transit Company, Respondent on the Appeal of the Board of Railroad Commissioners herein, and Appellant on the Cross-Appeal of Aero Mayflower Transit Company herein, and respectfully petitions for a rehearing en banc of all the issues on appeal before this Honorable Court, upon the following grounds: "

(I) That a fact, material to the decision, was overlooked by the Court;

(II) That a question decisive of the case submitted by counsel was overlooked by the Court;

(III) That the decision is in conflict with an express statute to which the attention of the Court was not directed.

(IV) That the decision is in conflict with a controlling decision to which the attention of the Court was not directed.

STATEMENT

This Court, like all Courts operating in the Anglo-American tradition of a government of law and not a government of men, expressly recognizes that its opinions, expressions and decisions are not infallible. For that reason, and, also, because it desires the aid of litigants and counsel in the production of opinions resting on the integrity of reasoned internal structure, this Court has by its own rules, provided for rehearings, and petitions for rehearings in every case coming within its Rule XV. In the spirit of that rule the undersigned counsel files and presents this Petition for Rehearing, confident that this Court is desirous of withholding from the Montana Reports any expression or decision which is freighted with its own internal contradictions and misstatements of fact, as well as law, and which denies effect to the Federal Constitution.

Desirable as it may be for the Legislature to impose on an interstate motor carrier some form of taxation, constitutional in substance and effect, by way of compensation for the use of the highways of Montana, *it simply is not the business* of the judiciary to supply the imposition, and the absence of proper legislative action confers no such authority on the judiciary, nor do erroneous statements of fact or law supply such authority. The vice of the opinion, as counsel understands it, is that the Court under the mandate to uphold legislative enactments misreads that mandate to mean that *the court is required to supply legislative deficiencies*, i.e., the bricks of the wall, and not the judicial mortar of construction. And in supplying judicial mortar, the straw of erroneous factual assumptions corrupt the mass.

These appeals come to this Court after long, serious and patient judicial review by the trial judge. Certainly, he

was just as anxious "to vindicate the constitutionality of the statutes" as this Court. *He could not sustain the tax on the gross revenue of the interstate operator from interstate operations only, because it was a privilege tax merely, a tax on the bare privilege of carrying on interstate commerce, in violation of the Federal Constitution. He refused, by judicial amendments to legislate where the legislature had not done so, i.e., relate it to compensation for use of the highways, or to defray the expense of regulating motor traffic. And we submit that nothing in this Court's opinion of June 29, 1946, overcomes or challenges the soundness of that conclusion. We first advert to the internal construction of the opinion.*

A

Argument (Points 1 to 4 of Petition, inclusive)

UNTRUE AND INCORRECT STATEMENTS IN THE OPINION VITIATING ITS RATIONALE

Every lawyer practicing before this Court owes to the Court the duty of pointing out untrue, incorrect or erroneous statements of fact or of law, or both, in the opinions emanating from the Court. This duty should be discharged by members of the bar irrespective of whether they are counsel in a given action. A fortiori, when they are counsel, and such erroneous statements are foundation material for erroneous conclusions.

(a) In the first paragraph of the opinion it is said:

"This controversy involves the question as to what extent a state may impose burdens in the way of licenses and taxes upon motor carriers engaged in interstate commerce for operating their vehicles over the highways of the state. Such exactions are imposed upon the presumption that the state owns the highways within its borders and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways."

Passing over the fact that the carrier here is engaged *solely* in interstate commerce (as found in Par. 3 of the opinion) the statement that the taxes are exacted as compensation for the use of the highways,

"and the revenue derived therefrom shall be expended to build, maintain and supervise such highways,"

is not true as to the quoted words.

Sections 3847.16, 3847.17 and 3847.27 covering both the \$10.00 flat per vehicle tax and the $\frac{1}{2}$ of 1 per cent gross revenue tax, *pass the tax to the motor carrier fund* which

"shall be available for the purpose of defraying the expenses of administration of this Act (the Motor Carrier Act) and the regulation of the businesses herein described"* (*Parenthesis ours)

Not one cent goes to build any Montana highway.

Not one cent goes to maintain any Montana highway.

Not one cent goes to supervise any Montana highway.

Surely, the Court does not desire such erroneous statements to stand. And yet they are the very foundation—the rationale—of the opinion, for that error is repeated again and again in the opinion, viz.,

In Paragraph 19, page 13, it is said:

"The foregoing authorities clearly establish the right of the state to impose upon motor carriers engaged in interstate commerce exactions by way of taxes and license for use by such motor carriers of the state highways when such exactions are necessary to build, maintain, and supervise the highways. In addition the exactions must be such as are reasonably necessary for the purposes mentioned, and must not be discriminatory as between state and interstate carriers."

In the next to the last paragraph of the opinion, page 21, it is said:

"In the case at bar Montana owns the highways over which the company operates its vehicles and the taxes imposed are for the use of the state highways. The

revenue collected is devoted to the building, repairing and policing of such highways, and that which the state furnishes is an aid, not a burden to interstate commerce."

The Board of Railroad Commissioners in this case never made any contention that the revenues from these license taxes were to be used for *building, maintaining or supervising highways*. The Board could not do so, and claim the fees. The revenue is for "*the expenses of administration of this act (Motor Carrier Act) and the regulation of the businesses herein described,*"

a far different purpose, than highway building, repair and supervision.

During the argument in open Court, it was made clear that the revenues from the taxes in question were not levied for, or in fact used for, or divested to highway construction, maintenance, repair and supervision. (And so, too, the Brief of Aero in this case. Appellant Aero pages 51, et seq.)

Thus, it is seen that the opinion begins and concludes on the erroneous statement that the revenues from these taxes are for highway building, repair and supervision. Surely, the Court will recall, on reading this petition, that revenues for highway building, repair and supervision come only from gasoline license taxes in Montana collected by the State Board of Equalization and administered by the Montana Highway Commission, and that the Board of Railroad Commissioners has nothing to do with such exactions.

The idea that these revenues attempted to be exacted from Aero are for highway construction, maintenance, repair and supervision, is so firmly fixed in the court's minds, apparently, that the opinion cites *Interstate Transit vs. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, in support of its reasoning. But in that case, Mr. Justice Brandeis, writing for the United States Supreme Court, *invalidated a Tennessee statute for the very reason that the tax "was not,"* in the court's words, "*exacted for such purposes,*" i.e., construction or maintenance of highways or bridges, "*but merely as a privilege tax on the carrying on of interstate*

business." The Justice pointed out that in Tennessee, as in Montana, the revenues for highways came from other taxes. The case is a plain, unassailable authority for Judge Lynch's opinion. And yet the opinion in this case (Par. 19, page 13) uses it as authority to bolster the erroneous assumption that the Montana licenses are to build, maintain and supervise highways.

(b) Another statement, at once incorrect and misleading, is found in Paragraph 5 of the opinion, where it is stated: (Page 3)

"It appears that the Board has heretofore and for some years collected two separate exactions from the Company: The Registration License Tax authorized by sections 1760-1760.10, Revised Codes; and the tax on sales of gasoline, authorized by sections 2381.1 to 2396.9, Revised Codes."

Surely this Court does not desire to represent that the Board of Railroad Commissioners collects either,

(a) the registration fees collected by the Registrar of Motor Vehicles (Sections 1760-1760.10, R.C.M. 1935); or

(b) the gasoline license tax collected by the State Board of Equalization. (Sec. 2381.1-2396.9, R.C.M. 1935.)

What purpose can be subserved by the inclusion of this erroneous statement? Surely, the first erroneous utterance can not be bolstered by a second. The Board of Railroad Commissioners makes no claim to collect these taxes. These incorrect statements show very clearly the necessity for a rehearing in this action, for these factual errors make manifest that whatever the cause, the basic material facts in the case remain obscure to the court. And where the basic facts remain obscure, the legal conclusions are without foundation. If counsel for appellant Aero is in any way responsible for such errors, he now apologizes to the Court. But, upon rereading Aero's briefs, he does not find any such misstatements in the briefs.

B

THE INTERNAL CONTRADICTIONS VITIATING THE OPINION AS
RESPECTS THE GROSS REVENUE TAX.

(a) In paragraph 3, page 2 of the opinion, this Court clearly states the undisputed and indisputable fact that the operations of Aero Mayflower Transit Company are wholly interstate. The opinion says:

"There is no dispute as to the facts. The Company is engaged in the motor transportation of used or second hand household goods and office furniture from one state to another for hire. It does not transport any goods of any nature or kind from one point to another in the same state. *The only transportation it engages in, so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state.*"

In paragraph 25, page 17 of the opinion, the opinion states:

"By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, *State v. Bowker*, 63 Mont. 1, 205 Pac. 961, it becomes clear that the clause in section 3847.27 imposing upon the company a tax of one-half of one per cent based upon its 'gross operating revenue' that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16 which is as follows:

"When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and

such other information concerning its operation within this state as may be required, by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.' "

In paragraph 26, page 18 of the opinion, it is stated:

"It was said in *United States v. Freeman*, 3 Howard, 565, (44 U. S. 548); 'A thing which is within the intention of the makers of the statute, is as much within the statute as if it were in the letter.' Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree, *no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated within the state.*"

Thus the opinion, in one breath finds Aero's operations interstate only, and then in the next breath says that irrespective of that fact, Aero is liable for a minimum of a \$15.00 fee, even though it receives no revenue in Montana, and it would be liable for such excess over \$15.00 as the Commission might arbitrarily undertake to impose, even though it did no business at all in Montana. If there must first be revenue from an operation in Montana before any part of this statute is applicable to the Aero Mayflower Transit Company, (and the undisputed fact is that it does no business in Montana,) *then the imposition of a minimum of \$15.00 for revenue tax becomes a privilege tax and nothing else.* That is a wholly inconsistent attitude and should be corrected by our Supreme Court.

In other words, *we submit that this Court must agree with the words of the statute and with both Aero and the Board in its interpretation that the tax under Section 3847.27 is a tax on gross operating revenue—without revenue there can be no tax at all, for the legislature has laid the tax on revenue.* The \$15.00 is not another flat per vehicle tax; (supplied by Section 3847.16) it is the minimum tax only when gross operating revenue is present, according to the court's language (Par. 25, page 17 of opinion). "the gross revenue derived by the company's operations in

Montana." Now, since there are no operations in Montana, as the opinion concedes (Par. 3, page 2 of opinion) \$15.00 may not be taken from the operator just because it is easy to say "Give us \$15.00." The error in the opinion stems from the fact that the Court confuses the \$15.00 minimum exaction under a gross revenue tax *where revenue is present*, a mill, a cent, a dollar, or more, with a fee for operating a vehicle in the State, regardless of revenue from the operation. *The \$15.00 is not a fee for operating a vehicle*; it is a minimum fee upon gross revenues when $\frac{1}{2}$ of 1% of gross revenues do not amount to the sum of \$15.00. Operating fees are covered by the Registration License Tax administered by the Registrar of Motor Vehicles, by the Gasoline License Tax administered by the State Board of Equalization, and by Section 3847.16, imposing the flat \$10.00 fee "for every motor vehicle *operated*" by a motor carrier "over or upon the public highways of this State." Surely the Court will correct its opinion in this respect. It will not assume to hold the \$15.00 minimum of the gross revenue tax, a flat per vehicle operating tax. There must be revenue before any part of that tax is collectible.

The Court cites Justice Brandeis's language in *Interstate Transit, Incorporated vs. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, wherein he said,

"While a state may not lay a tax on the privilege of engaging in interstate commerce," . . .

but ignores that fundamental prohibition, by upholding as a tax on revenue from interstate commerce, a \$15.00 exaction when there is no revenue from operations in Montana, and orders the wholly interstate operations of Aero to cease if Aero does not pay \$15.00 from Montana revenues when there are no Montana revenues. By such a ruling, Montana can effectually arrest and stop all interstate commerce across its borders.

Another misconception, related to the failure to grasp the true meaning of the \$15.00 minimum is found in Par. 8 of the opinion, where the Court says:

"The effect of the trial court's order enjoining the Board from enforcing any of the provisions of section

3847.27, Revised Codes, is to relieve the Company from the obligation to comply with the Board's demand to pay the tax of one-half of one percent of its gross revenue or the minimum fee of \$15.00 on each vehicle operated over the roads of the state." (Italics ours).

The tax under Section 3847.27 is not in the alternative, i. e. $\frac{1}{2}$ of 1 per cent of gross revenue, or \$15.00 per vehicle operated; the \$15.00 is a proviso whereby a minimum in that amount is fixed if the application of the percentage factor does not produce more than \$14.9999.

We have demonstrated above that two facts material to the decision were overlooked by the Court in that no account of them was taken in final conclusion, i. e.

(1) That no part of the (a) \$10.00 per vehicle flat fee, or (b) the gross revenue fee is destined for, or used for, the construction, maintenance, repair or supervision of the highway; and

(2) That Aero has no revenues from any "operations in Montana" for it operates in interstate commerce only.

Referring again to the *second ground for rehearing*, the question decisive of the case submitted by counsel, overlooked by the court, is that the statute does not supply, the Board has not assumed to supply, and this Court does not supply, in its opinion, any yardstick whatever to "ascertain the gross revenue derived by the company's operations in Montana," which, the opinion says, is to be used "as a basis for the levy of the tax of one-half of one per cent."

What the opinion does not do, and what it does, as respects the gross revenue tax, is this:

It does not mention, or address itself to, or in any manner attempt to dispose of these cases from the Supreme Court of the United States, holding that the State may not tax interstate commerce as such, the right to engage in interstate commerce, or the gross receipts of purely interstate commerce transactions, viz.:

J. D. Adams Mfg. v. Storen, 304 U. S. 307, 82 L. ed. 1365;

Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015;

Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230,

30 L. ed. 888, 7 S. Ct. 857, 1 Inters. Com. Rep. 51;

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308;

Galveston, H. & S. A. R. Co. v. Texas, 219 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638;

Meyer v. Wells, F. & Co., 223 U. S. 298, 56 L. ed. 445, 32 S. Ct. 218;

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126;

United States Glue Co. v. Oak Creek, 247 U. S. 321, 328, 62 L. ed. 1135, 1141, 38 S. Ct. 499, Ann. Cas. 1918E, 748;

New Jersey Bell Teleph. Co. v. State Bd. of Taxes & Assessments, 280 U. S. 338, 349, 74 L. ed. 463, 469, 50 S. Ct. 111;

Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 297 U. S. 650, 655, 80 L. ed. 956, 959, 56 S. Ct. 608;

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90, ante, 64, 58 S. Ct. 72;

Western Live Stock v. Bureau of Revenue, No. 322, October Term, 1937 (303 U. S. 250, ante, 823, 58 S. Ct. 546, 115 A. L. R. 944).

It ignores the decision of the Supreme Court of the United States uttered by Mr. Justice Hughes in a unanimous opinion, condemning a Montana tax on all business, interstate and intrastate, of a telephone company in

Cooney v. Mountain States Telephone and Telegraph Co., 79 L. Ed. 934.

The opinion ignores the long line of cases from this Court, the Supreme Court of Montana, recognizing and enforcing the above principles, in cases dealing with interstate commerce, cases directly in point.

State v. Great Northern Railway Co., 14 Mont. 381; 36 Pac. 458;

State v. Northern Pacific Express Co., 27 Mont. 419; 71 Pac. 404;

State v. Western Union Telegraph Co., 43 Mont. 445; 117 Pac. 93;

C. M. & St. P. Ry. Co. v. Swindlehurst, 47 Mont. 119; 130 Pac. 966;

J. I. Case Threshing Machine Co. v. Stewart, 60 Mont. 380; 199 Pac. 909;

C. M. St. P. & P. RR. v. Harmon, 89 Mont. 1, 295 Pac. 762;

Interstate Transit Co. v. Derr, 71 Mont. 222, 228 Pac. 624;

State v. Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301;

Fruitgrowers Express Co. v. Brett, 94 Mont. 281, 22 Pac. 42d 171.

These holdings are in no manner affected by the fact that the commerce moves by rail instead of by truck. And the Derr case dealt with interstate movement by truck.

The opinion does, sub silentio, confess the weight of those cases, however, for it pares down Section 3847.27, the gross revenue tax statute, which in terms applies to,

"the gross operating revenue of such carrier for the preceding three months of operation," etc. (Page 5)

to mean,

"the gross revenue derived from operations in Montana," (Page 17)

and reference to sub-paragraph (b) of Section 3847.16, to mean,

"the gross revenue derived by the company's operations in Montana in order to use that as a basis for the levy of the tax of one-half of one per cent." (Page 17)

The opinion does, in substance, admit that this construction is a judicial gratuity, and unwarranted as such, for it says,

"Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue

is not provided by the statute, a contention to which we do not agree," etc., and then proceeds to excuse the omission by saying "no difficulty" arises with reference to the \$15.00 minimum.

The minimum is merely the tail, not the hide:

Let us take the Court at its word and test the basis so found. Let us remember that the only transportation Aero engages in, as the opinion says, (Paragraph 3, page 2):

"... so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state."

The service may be paid for by consignor, by consignee, or by some third person. *Not one dollar of the payment may come from any source in Montana.* What is the business done in Montana? The Court says it is *transportation*, i.e., the movement of goods in a motor vehicle over the highways of the state.

(a) Where no dollar is received in Montana, what is the basis of apportionment of Aero's gross revenues, received outside of Montana?

On Montana mileage against system mileage?

On mileage with load?

On mileage without load?

On a per vehicle basis? Loaded vehicles only? Or all vehicles loaded or empty?

(b) If a consignor or consignee in Montana pays for the interstate service, what is the basis of the apportionment of gross revenues?

The dollars originating in Montana against system gross dollars?

Weighted by any factor of highways use?

Weighted by any factor of mileage?

(c) What relation is there between "the gross revenue derived from operations in Montana," as the Court says, and "transportation" in Montana?

Who is to determine the basis of apportionment? The Board? *The legislature did not say so. The legislature did not say that the Board could select any method it pleases. The legislature did not say this Court could select the method.* The legislature simply failed to provide a method and, accordingly, a workable law for gross revenue apportionment, assuming that it could within the Federal Constitution.

The opinion really recognizes this condition, and in final analysis attempts to excuse it in this language:

"Furthermore, in this connection it is our opinion that when the legislature enacts a statute imposing the duty of enforcement of such statute upon a particular board or officer of the state but fails or neglects to clearly prescribe and incorporate in the Act the mode of enforcement, that such officer or board may adopt any fair and reasonable mode of enforcement designated to effectuate the purposes of the Act. In other words, when a duty is imposed upon a particular officer or board in express terms such other duties are implied as are necessary to carry into effect those that are expressed.

"Such, we think is the effect of the rule laid down in the case of Morse v. Granite County, 44 Mont. 78, 119 Pac. 286, and followed in Fisher v. Stillwater county, 81 Mont. 31, 261 Pac. 607; Arnold v. Custer County, 83 Mont. 130, 269 Pac. 396, and State v. Stark, 100 Mont. 365, 52 Pac. (2d) 890.

That language has no support in the facts, and no support in the law.

No support in the facts—for the omission in the statute is not omission of a "mode of enforcement," but of a *method of taxation*.

No support in the law,—because the duty of apportionment is not a mere administrative rule-making authority, but a duty of substantive law, not of a rule-making agency.

And this Court, up to now, has uniformly insisted on the strict construction of taxing statutes:

Shubert v. Glacier County, 93 Mont. 160, 18 Pac. (2nd) 614;

Vennekolt v. Lutey, 96 Mont. 72, 28 Pac. (2d) 452;
 Mills v. State Board of Equalization, 97 Mont. 13, 33
 Pac. (2nd) 563;
 State ex rel. Whitlock v. Board of Equalization, 100
 Mont. 72, 45 Pac. (2nd) 684;
 Montana Life Ins. Co. v. Shannon, 106 Mont. 500, 78
 Pac. (2nd), 946;
 Vantura v. Montana Liquor Control Board, 113 Mont.
 265, 124 Pac. (2nd) 569;
 U. S. Gypsum Co. v. State Board of Equalization, 116
 Mont. 275, 149 Pac. (2nd) 774.

And see: Sutherland, Statutory Construction, (3rd Ed.
 Horack) Ch. 67, Secs. 6701 and 6705.

None of the four (4) cases cited in the opinion are applicable, because none of them relate to the taxing power, or present a situation where an administrative tribunal is permitted to invent a method of tax apportionment, or to select between possible methods of tax apportionment, or authorize the court to change the words of a statute.

In the *Morse case*, 44 Mont. 78, it was shown that the Board of County Commissioners had express statutory authority to build a Court House, and, also, to issue bonds.

In the *Fisher case*, 81 Mont. 31, the Court found that "the law authorizes the expenditures," and this finding is supported by the most explicit terms of the statute itself.

In the *Custer County case*, 83 Mont. 130, this Court pointed out that the express terms of the statutes gave the County Board implied authority for its acts, saying of the statutes, "*We do the italicizing and direct special attention to the italicized words.*"

In the *Stark case*, 100 Mont. 365, the plumbing board was told by the statute to give examinations to would-be plumbers and complaint was made that there were no standards specifying the nature of the examination. The Court found that the Act itself indicated the nature of the examination by requiring examiners to be versed in modern sanitary plumbing and sewage and applicants to be examined on their fitness to engage in the business.

But Section 3847.27, in express terms, commands the Board to lay a tax on

"the gross operating revenue of such carrier."

The statute commands that, and that alone. It is not a question of the statute omitting to fill in details. The question is, has the Board the authority to do what the statute commands it not to do, i.e.,

"to lay a tax on anything less than 'the gross operating revenue'?"

The opinion says "*yes the Board can lay a tax on Montana revenues only, and it can follow any method it pleases to determine what are Montana revenues.*"

That is the vice of the opinion—that the Board can invent any method it pleases to determine what are gross operating revenues in Montana. We challenge counsel to produce a single case upholding such a conclusion.

Since the \$10.00 flat per vehicle tax laid under Section 3847.16 is not laid for construction, maintenance, repair or supervision of highways, but solely because Aero operates a motor vehicle over the highways—irrespective of any revenue accruing from the operation—it is obvious that it, too, is a mere tax for the privilege of operating in a motor vehicle in interstate commerce and as such falls under the very language of Justice Brandeis quoted by the Court in the opinion.

CONCLUSION

In conclusion, it is respectfully submitted that a complete rehearing of all the issues herein should be had because,

I. The opinion is built on misstatements of fact, and consequent misconceptions of law, which, when removed and excised from the opinion, as they must be in the light of the true facts, leave the opinion without any foundation upon which to stand; and,

II. There is no authority in reason, in law, or in judicial precedent, for this Court, or any other American Court, holding that an administrative tribunal has the power on

its own motion to invent a method, formula, or rule for apportionment of a tax when the legislature has commanded that no apportionment is to be attempted, and in any case, has set no standard, rule or formula for any apportionment.

III. The decision of Judge Lynch should be affirmed, for if that is not done the doctrine of non-delegability of the power to tax is nullified, and an administrative tribunal given the power to invent a tax which only the legislature may do, consistent with the Federal and State Constitutions.

Submitted with respect, and in confidence that the Court desires naught but truth in its opinions.

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